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# THE "NEW" LAW OF MONOPOLIZATION: AN EXAMINATION OF *MCI COMMUNICATIONS CORP. V. AMERICAN TELEPHONE & TELEGRAPH CO.*

Spencer Weber Waller\*

On January 12, 1983, the United States Court of Appeals for the Seventh Circuit released its long-awaited opinion in *MCI Communications Corp. v. American Telephone & Telegraph Co.*<sup>1</sup> The 128-page opinion concerns the 1974 monopolization suit brought by MCI against the alleged predatory and exclusionary practices of AT&T during the early seventies, a period when MCI first began to compete aggressively with AT&T in the private line long-distance telecommunications market. In a two-to-one decision, a panel of the Seventh Circuit reversed a \$1.8 billion judgment award against AT&T while rejecting allegations that AT&T had engaged in predatory pricing.<sup>2</sup> The court, however, affirmed most of the findings of liability against AT&T and remanded the case for a new trial on the issue of damages.<sup>3</sup> While a plethora of issues was addressed in the opinion,<sup>4</sup> both the majority and the dissenting opinions concentrated on the predatory pricing claims of MCI and on the proof and calculation of damages. This article therefore limits its analysis to these critical issues and briefly addresses the application of the essential facilities doctrine to AT&T's refusal to interconnect MCI with the Bell System.

## I. PREDATORY PRICING

### A. Price-Cost Comparisons as a Measure of Predation

Allegations of predatory pricing have played an increasingly prominent role in antitrust cases over the past eight years,<sup>5</sup> yet court decisions remain

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1. 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3280-81 (U.S. Oct. 11, 1983) (Nos. 83-21, 83-32, 83-217). Hereinafter the parties will be abbreviated as "MCI" and "AT&T."

2. *Id.* at 1111-15, 1161-66.

3. *Id.* at 1131-44, 1145-47, 1150-53, 1166-69.

4. Aside from the predatory pricing and damages issues, the opinion also addresses anti-trust immunity, *id.* at 1101-05, federal and state regulation of the telecommunications industry, *id.* at 1105-11; the essential facilities doctrine, *id.* at 1132-33; tying, *id.* at 1144; the *Noerr-Pennington* doctrine, *id.* at 1153-59; and pre-announcement of new prices and services by a monopolist, *id.* at 1128-30.

5. For appendices listing predation cases reported between 1976 and 1982, see Calvani and Lynch, *Predatory Pricing Under the Robinson-Patman & Sherman Acts: An Introduction*, 51 ANTITRUST L.J. 375, 399 (1982); Hurwitz and Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 151 (1982).

Many forms of predation are possible, see, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*,

inconclusive as to what constitutes unlawful predatory practices. In a groundbreaking article, Professors Areeda and Turner proposed a uniform standard for analyzing claims of predatory pricing: allegations of predatory pricing should be judged solely by comparing a defendant's prices with the marginal cost of producing the goods or services in question.<sup>6</sup> According to Areeda and Turner, proof of pricing below marginal cost, or below average variable cost as a proxy,<sup>7</sup> would be conclusive evidence of unlawful predation, while proof of pricing at or above average variable cost would establish the legality of the defendant's pricing policies.<sup>8</sup>

The courts and commentators have split into three main camps over the validity of the rule proposed by Areeda and Turner. A significant number of courts have adopted, with varying degrees of reservation, the Areeda-Turner average variable cost rule for judging predation.<sup>9</sup> Other courts and commentators have sought to measure predation by using different cost-based standards,<sup>10</sup> while still others have rejected the Areeda-Turner rule for a wider

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603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (claims of predation involving product innovation). The most prevalent allegations, however, concern predatory pricing. See Calvani & Lynch, *supra*, at 399; Hurwitz & Kovacic, *supra*, at 151.

6. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Areeda and Turner's article analyzes both the marginal cost, which is defined as the incremental increase in total cost resulting from production of an additional unit of output, and the average total cost, which focuses on the sum of fixed and variable costs divided by the number of units of output, as possible measures of predatory pricing. The authors conclude that marginal cost is more relevant to predatory pricing analysis because it is this incremental measure of costs to which a firm looks when it seeks to maximize profits or minimize losses. *Id.* at 701-02; *see infra* note 8.

7. Average variable cost is the sum of those costs which vary with changes in output over the short run, divided by the number of units of output. Areeda and Turner conclude that average variable cost, though often a different figure than marginal cost, may be useful as a substitute for marginal cost in predatory pricing analysis because a firm's marginal cost may be difficult to ascertain from general business accounting data. Areeda & Turner, *supra* note 6, at 716.

8. *Id.* at 709-13. Areeda and Turner find pricing at or above average variable cost to be legitimate competitive pricing and thus non-predatory. *Id.* at 704-09. Similarly, they consider pricing at or above marginal cost to be non-predatory because the alternative would permit the entry of inefficient firms, waste economic resources, and create administrative problems in enforcement. *Id.* at 711. Nevertheless, Areeda and Turner find pricing below marginal cost to be predatory because such a pricing scheme wastes social resources and greatly increases the possibility that competitors will be extinguished. *Id.* at 712.

9. *See* O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1711 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 431 (7th Cir. 1980); Americana Indus. v. Wometco de Puerto Rico, Inc., 556 F.2d 624, 628 (1st Cir. 1977); *see also* Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981) (identifying the need for a marginal cost methodology in analyzing predatory pricing), *cert. denied*, 102 S. Ct. 1438 (1982).

10. *See* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1034 n.29 (9th Cir. 1981) (plaintiff may prove that prices above average variable cost are predatory if such prices are below defendant's short-run profit maximizing price and if the barriers to market entry are great), *cert. denied*, 103 S. Ct. 58 (1982); International Air Indus. v. American Excelsion Co., 517 F.2d 714, 724 (5th Cir. 1975) (damage to competition will not be inferred

ranging inquiry into the defendant's intent.<sup>11</sup>

The Seventh Circuit previously addressed the Areeda-Turner position in *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*<sup>12</sup>, where the court affirmed a directed verdict for the defendant because of the plaintiff's failure to prove that the defendant's prices were below average variable cost.<sup>13</sup> Although the court found that the Areeda-Turner rule was "a relevant and extremely useful factor in determining the presence of predatory conduct," the court expressed a willingness to consider other unspecified factors in analyzing predatory pricing claims.<sup>14</sup>

Thus, the Seventh Circuit in *MCI* was not approaching the issue of predatory pricing with an entirely clean slate. The situation presented to the court in *MCI*, however, forced an analysis of the predatory pricing issue in a new light. While the debate over the validity of the Areeda-Turner rule generally was concerned with the choice between using average variable costs or average total costs,<sup>15</sup> neither party in *MCI* phrased its arguments in these terms. Rather, *MCI* argued that AT&T was guilty of predatory pricing because it had priced its long-distance business telephone services below fully distributed cost ("FDC")<sup>16</sup> with the intent to injure *MCI*. AT&T responded that its pricing policies should be presumed lawful unless *MCI* proved that its prices were below long-run incremental cost ("LRIC").<sup>17</sup> The parties' choices of cost standards were dictated by the availability of the evidence

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from pricing below average variable cost if the effect is either beneficial or insignificant), *cert. denied*, 424 U.S. 943 (1976). See generally Note, *Predatory Pricing: The Retreat From the AVC Rule and the Search for a Practical Alternative*, 22 B.C.L. REV. 467 (1981).

11. *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983); see L. SULLIVAN, ANTITRUST 108-13 (1977); Dirlam, *Marginal Cost Pricing Tests for Predation: Naive Welfare Economics and Public Policy*, 26 ANTITRUST BULL. 769, 799-811 (1981); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1229-31 (1977).

12. 615 F.2d 427 (7th Cir. 1980) (a small producer of road gravel charged its competitor, a large, diversified company, with predatory pricing in violation of § 2 of the Sherman Act).

13. *Id.* at 432.

14. *Id.*

15. Average total cost is the sum of all costs (fixed and variable), divided by the number of units of output. Average variable cost is the sum of those costs which vary with changes in output over the short run, divided by the number of units of output. The court in *MCI* discusses these and other measures of cost. 708 F.2d at 1114-18; see *supra* notes 6-7.

16. Fully distributed cost is defined as the average additional cost per unit of adding a new product or service to a preexisting line, which includes a portion of the firm's unallocable overhead assigned to the new product or service. Fully distributed cost is used most often in regulatory rate-making proceedings because of its ease of application. See generally J. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* (1961) (discussion of competing cost methods in public utility ratemaking).

17. The long-run incremental cost of a single product is total company cost minus what the total cost to the company would have been if it had not produced the single product, divided by the quantity of the single product produced. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 9 n.26 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 252 n.79 (1979).

concerning AT&T's cost; AT&T generally used cost studies based on LRIC for internal purposes<sup>18</sup> while AT&T had been required to prepare several cost studies for the FCC using various FDC methodologies<sup>19</sup> which were available to MCI.

At trial, the district court erroneously cast the parties' contentions as a debate over the validity of the Areeda-Turner rule by equating LRIC with average variable cost and equating FDC with average total cost.<sup>20</sup> The trial court, treating the choice of a proper cost standard as a question of fact, instructed the jury to select the cost standard which they thought most appropriately reflected the evidence of the case.<sup>21</sup> In overturning the jury's finding that AT&T had engaged in predatory pricing by pricing its Hi-Lo tariff<sup>22</sup> below FDC, the Seventh Circuit's opinion first focused on the propriety of allowing the jury to choose which cost standard to apply.<sup>23</sup> The court held that the selection of the cost standard in predatory pricing cases was not a factual issue to be determined by the jury but, rather, was a question of law to be decided in the first instance by the judge.<sup>24</sup>

As a preliminary matter, the court emphasized that predatory pricing could only be measured through a comparison of a defendant's prices and a rigorously defined measure of cost.<sup>25</sup> The court then characterized the use of FDC as an arbitrary, unreliable, and unsuitable economic measure of cost.<sup>26</sup> Noting that no court had ever approved the use of FDC in a predatory pricing case, the court stated:

Pricing at or above long-run incremental cost in a competitive market is a rational and profitable business practice. Because there are legitimate, and in fact compelling, business reasons for pricing products at or above their long-run incremental cost, no predatory intent should be presumed or inferred from such conduct.<sup>27</sup>

Thus, in order to establish a prima facie claim of predatory pricing in this case, MCI bore the burden of establishing that AT&T's prices were below the long-run incremental cost of providing the service.<sup>28</sup>

Echoing the reasoning of the Areeda-Turner rule, the court held that some form of a marginal or incremental cost standard was required to judge

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18. 708 F.2d at 1116 n.47.

19. Results of cost studies utilizing seven different FDC methods were introduced at trial. *Id.*

20. *Id.* at 1115.

21. *Id.* at 1111.

22. The so-called Hi-Lo tariff was AT&T's first departure from nationwide rate averaging in the long-distance telecommunications market. Prices were lowered for certain high density circuits and raised for low density circuits. A separate schedule was then established for shorter routes. Hi-Lo was one of two tariffs at issue in *MCI*. The other tariff was Telpak, AT&T's bulk rate for large users of private line circuits, which the jury found to be lawfully priced.

23. *Id.* at 1111-12.

24. *Id.* at 1111.

25. *Id.* at 1112-14.

26. *Id.* at 1116-17.

27. *Id.* at 1122-23.

28. *Id.*

predatory pricing claims.<sup>29</sup> The majority opinion reasoned that allowing a dominant firm to reduce its prices to long-run incremental cost served to promote competition based on relative efficiency.<sup>30</sup> Under this approach, consumers would receive the benefits of such price reductions while only a less efficient competitor would suffer as a result of its inability to be cost efficient.<sup>31</sup>

*MCI* represents a victory for the theory, if not the precise results, of the Areeda-Turner rule.<sup>32</sup> The portion of the opinion dealing with predatory pricing also represents the ascendancy of a form of antitrust analysis more dependent on economic theory than on traditional notions which require an inquiry into a defendant's intent. The majority's use of an economic methodology underscores its belief that even when claims are brought against a dominant firm, overly stringent rules imposing liability for predatory pricing would create a "price umbrella" protecting inefficient competitors and depriving consumers of the benefits of price reductions.<sup>33</sup> Although the majority acknowledged the existence of more complex and indeterminate economic models which suggest concerns over the pricing strategies of dominant firms, it declined to address these concerns, stating that they were more properly the province of the FCC in regulating the telecommunications industry.<sup>34</sup>

#### *B. Judge Wood's Dissent: The Fear of Monopoly Power*

Although he agreed with the majority on most issues, Judge Harlington Wood disagreed with the majority's treatment of predatory pricing and damages. Judge Wood's dissent is particularly significant because it reflects the deep philosophical divisions separating factions of the bench, bar, and academic community over fundamental issues of antitrust law and policy.

Judge Wood, in considering the predatory pricing issue, adopted a two-

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29. *Id.* at 1116.

30. *Id.* at 1117.

31. *Id.*

32. The specific cost-based test advocated by Areeda and Turner involved the use of average variable cost. Areeda & Turner, *supra* note 6, at 716-18. The *MCI* court did not adopt average variable cost, but adopted long-run incremental cost which the majority acknowledged was an economic definition of average total cost for one product of a multi-product firm. 708 F.2d at 1116. The court explained its divergence from the precise formulation of the Areeda and Turner test by stating:

We regard this case as being tried under a stipulation that a form of average total cost would be used to determine predation. Thus, we analyze whether LRIC or FDC is the most meaningful economic measure of average total cost. This analysis should not be construed as a rejection of the Areeda-Turner rule using average variable costs. We affirm our previous holding in *Chillicothe* that pricing below average cost is normally one of the most relevant indications of predatory pricing.

*Id.* at 1120 n.54. But see *id.* at 1177 n.5 (the dissent's critique of the majority's use of economic analysis).

33. 708 F.2d at 1125.

34. *Id.* at 1110-11.

prong attack on the majority's strict adherence to price-cost comparisons in adjudicating claims of predatory pricing. The first and broadest ground for his disagreement concerned the majority's discounting of noneconomic reasoning in its analysis of predation.<sup>35</sup> Judge Wood argued that the majority had retreated from previous case law within the circuit which called for a wide-ranging inquiry into the behavior of a dominant firm charged with predatory tactics.<sup>36</sup> Drawing on legislative history of the Sherman Act,<sup>37</sup> along with a variety of secondary sources,<sup>38</sup> Judge Wood argued that the scope of the antitrust laws extended far beyond simply the promotion of certain narrow forms of economic efficiency, because the antitrust laws were broad instruments designed to restrain the acquisition and exploitation of monopoly power.<sup>39</sup> This position is in marked contrast to that of the majority, which would appear to tolerate the existence of dominant firms if such firms achieve economies of scale not available to smaller competitors, thus "dismiss[ing] concerns about the existence of vast social and economic power of monopolies per se."<sup>40</sup>

Judge Wood also disagreed with the majority's conclusion that LRIC constituted an appropriate measure of economic efficiency.<sup>41</sup> Stressing that the majority was considering only one static form of efficiency, namely productive efficiency, which is not necessarily synonymous with enhanced consumer welfare,<sup>42</sup> Judge Wood went on to argue in more technical terms that a com-

35. *Id.* at 1177-80.

36. *Id.* at 1176; see *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980); *National Dairy Products Corp. v. FTC*, 412 F.2d 605, 618-20 (7th Cir. 1969).

37. 708 F.2d at 1177-80 (citing 21 CONG. REC. 2457 (1890)).

38. *Id.* (citing, inter alia, Blake and Jones, *Towards a Three-Dimensional Antitrust Policy*, 65 CALIF. L. REV. 422 (1955); Letwin, *Congress and the Sherman Antitrust Laws: 1887-1890*, 23 U. CHI. L. REV. 221 (1955); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977)).

39. *Id.* Judge Wood's distaste for the majority's reliance solely on considerations of efficiency is eloquently captured in the following excerpt from his dissent:

While not negating the value of policy arguments based on efficiency, I am hesitant to abandon the jurisprudence and historical texture of the antitrust laws in order to embrace a set of seemingly hard and fast efficiency rules which present an illusion of conceptual and empirical tidiness. Instead, I would continue to permit the kind of inquiry into predatory use of economic power which this court encouraged in *Chillicothe* in order to preserve the important values embodied in the Sherman Act. . . . I submit that no such contribution will be made if we limit our definition of unlawful predation to the transgression of efficiency as defined by the formulae of micro-economics.

*Id.* at 1179.

40. *Id.* at 1177.

41. Judge Wood claimed that the "majority's preoccupation with one special form of efficiency . . . is too narrow even as an *economic* basis for a sound antitrust policy." *Id.* at 1180 (emphasis in original).

42. *Id.*

parison of a firm's prices with its long-run incremental costs would not reveal many forms of anticompetitive pricing behavior. He stated:

[T]he exclusive use of an LRIC standard to evaluate predatory pricing ignores the fact that predation is a strategic weapon available to a monopolist facing a new entrant. Such a test is therefore insensitive to the many forms of strategic conduct by a dominant firm which have no legitimate business purpose and are only instituted to discipline or eliminate competition with accompanying long-run detrimental effects for consumers.<sup>43</sup>

In focusing on the pricing strategies of a dominant firm, Judge Wood contended that so-called objective price-cost comparisons were basically incapable of separating legitimate from predatory price reductions, and he characterized the results of such tests as indeterminate.<sup>44</sup> The test preferred by Judge Wood would focus on the intent of the corporate actor and its officers in formulating pricing strategies in the face of new competition. He stated, "To shed light on these pricing strategies, which are the conscious decisions of the corporate planners, it is only proper that a plaintiff must be allowed to come forward with direct evidence of the defendant's intent in this regard."<sup>45</sup> This willingness to examine an entire range of factors in assessing predation,<sup>46</sup> as opposed to relying on the outcome of a cost-based test, demonstrates Judge Wood's reluctance to foreclose any inquiry into the exercise of monopoly power even if such behavior has at least a plausible, lawful explanation. While conceding the logic of the majority's predatory pricing rule in attempted monopolization cases where the defendant lacks significant market power, Judge Wood concluded that "there are sound economic and social reasons to be wary of the market power exercised by an existent monopolist who confronts a new entrant."<sup>47</sup> Based on the evidence in the record, Judge Wood would have affirmed the verdict against AT&T for predatory pricing.

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43. *Id.* at 1181. Judge Wood identified limit pricing (maintaining less than profit-maximizing prices in anticipation of the entry of a competitor in order to deter such entry) and differential pricing (shifting of revenues and costs between competitive and monopolistic products) as forms of anticompetitive pricing that an LRIC standard ignored. *Id.* at 1181-82.

44. *Id.* at 1182-83.

45. *Id.* at 1183.

46. Judge Wood cited with approval cases examining such factors as the timing of the pricing reductions, the geographic selectivity of the price reductions, the availability of profitable markets to offset temporary losses, and the selective use of massive product promotion. *Id.* at 1181-83. Judge Wood relied in particular on the Sixth Circuit's decision in *Borden, Inc. v. FTC*, 674 F.2d 498, 514-15 & n.40 (6th Cir. 1982), *vacated*, 1983-1 Trade Cas. (CCH) ¶ 65,383, and the Seventh Circuit's decision in *National Dairy Prod. Corp. v. FTC*, 412 F.2d 605, 618-20 (7th Cir. 1969). With regard to the *Borden* case, it is interesting to note that the FTC has subsequently modified its order to permit price reductions so long as prices exceed average variable costs. See 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1104, at 491 (Mar. 3, 1983).

47. 708 F.2d at 1181.



### C. The Dominant Firm as a Vigorous Competitor

MCI represents the far swing of the pendulum away from the rule laid down in *United States v. Aluminum Co. of America*,<sup>48</sup> in which Judge Learned Hand stated that following proof of monopoly power, liability for monopolization would ensue unless the monopolist proved that its conduct fell "within the exception established in favor of those who do not seek, but cannot avoid, the control of a market."<sup>49</sup> The demise of the rule casting a rebuttable presumption of illegality on a dominant firm possessing the necessary market share began in *United States v. Grinnell*.<sup>50</sup> The *Grinnell* decision set forth the plaintiff's burden of proof under section 2 of the Sherman Act.<sup>51</sup> Under *Grinnell*, the plaintiff must show that the defendant had: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>52</sup> Thus, the Supreme Court rejected the so-called no conduct theory of monopolization, and required an element of volitional conduct before liability could be imposed under section 2 of the Sherman Act.<sup>53</sup>

In *Grinnell*, the Supreme Court held that a firm possessing monopoly power would be guilty of monopolization only if its actions were either illegal—that is, a violation of section 1 of the Sherman Act—or exclusionary.<sup>54</sup> While

48. 148 F.2d 416 (2d Cir. 1945) (on certification from the Supreme Court); see also *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (taking an expansive approach to monopolization similar to that taken in *United States v. Aluminum Co. of Am.*).

49. 148 F.2d at 431.

50. 384 U.S. 563 (1966).

51. 15 U.S.C. § 2 (1976). Section 2 of the Sherman Act provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign states, shall be deemed guilty of a felony. . . .

*Id.*

52. 384 U.S. at 570-71.

53. See generally Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 110-11 (1981) (advocating the application of a tort duty-risk test to antitrust cases); Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1288, 1352-58 (1982) (advocating retention of specific intent and dangerous probability of success elements as used in *Swift & Co. v. United States*, 196 U.S. 375 (1905)); Handler and Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 191 (1980) (advocating a dual consideration of a firm's structural monopolistic dominance and its conduct); Pryzant, *Berkey Photo, Inc. v. Eastman Kodak Co.—The Beginning of the End of Monopolization*, 23 S. TEX. L.J. 259 (1982) (advocating the use of a compartmental test under which the firm must know, at the time of action, that it is doing something illegal); Note, *The Conduct Standard for Legally Acquired Monopolies Under Section 2 of the Sherman Act*, 49 U. CIN. L. REV. 206, 226-27 (1980) (advocating a conduct standard under which legal monopolies may not adopt market practices which unnecessarily exclude competition).

54. 384 U.S. at 576.

this precedent permitted a finding of monopolization even if the conduct was not illegal, the lower courts after *Grinnell* quickly restricted the type of conduct which would be labeled exclusionary and hence sufficient to impose liability under section 2. In terms of predatory pricing, such a finding required that the dominant firm's prices be below some measure of costs in order for the firm to be found guilty of violating the antitrust laws.<sup>55</sup> More generally, it meant that a monopolist was permitted to compete, and compete hard.

This theme was recently expressed in the Second Circuit's opinion in *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>56</sup> In *Berkey*, the court stated that monopoly power, in itself, is not unlawful, and that an integrated monopolist does not violate section 2 of the Sherman Act by introducing a group of dependent, related products without prior disclosure to its competitors. The court stated:

It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, the incentive would very likely be vitiated.

Withholding from others advance knowledge of one's new products, therefore, ordinarily constitutes valid competitive conduct. Because, as we have already indicated, a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, any success that it may achieve through the process of invention and innovation is clearly tolerated by the antitrust laws.<sup>57</sup>

Similarly, the same court in *SCM Corp. v. Xerox Corp.*<sup>58</sup> held that a monopolist had no obligation to license its patents to competitors. In *SCM*, the court permitted the defendant to retain exclusionary power and unique advantages derived from its patents by holding that once a patent has been lawfully obtained, the antitrust laws do not impose liability for conduct permissible under the patent laws.<sup>59</sup>

The majority in *MCI* followed this tradition by contending that the antitrust laws should not be used to prevent a dominant firm from engaging in price competition even if the result would be to prevent new entrants from successfully competing in the market. In this regard the opinion states:

If FDC is adopted as a floor for predatory pricing purposes . . . the regulated utility will be effectively prohibited from materially raising or

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55. See *supra* notes 6-10 and accompanying text.

56. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

57. *Id.* at 281.

58. 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

59. *Id.* at 1204-06; see also *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251 (3d Cir. 1980) (plaintiff must prove injury in fact from defendant's alleged abuse of the patent system), *cert. denied*, 452 U.S. 905 (1981); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927 (10th Cir.) (corporation can retain market share obtained through technological innovation by "the adoption of legal and ordinary marketing methods already used by others in the market"), *cert. dismissed*, 423 U.S. 802 (1975).

lowering prices to engage in competition. This result flies in the face of a major objective of the antitrust laws—the *promotion* of price competition. . . . An antitrust rule requiring a dominant firm to price at or above FDC in competitive markets may effectively require the firm to forego price competition and gradually abandon its market share, *i.e.*, lose its business. Constraining AT&T to FDC pricing of its competitive services thus runs the risk of permitting actually or potentially less efficient competitors to serve a growing segment of the telecommunications market and thus deprive consumers of the benefits of price competition.<sup>60</sup>

This point of view is in marked contrast to that of Judge Wood, who described the American antitrust experience as an overwhelming “abhorrence of the concentration of economic power.”<sup>61</sup>

The differences expressed by the majority and dissenting opinions in *MCI* over the willingness to let a monopolist aggressively compete in both price and product mirrors a growing split among the circuits that may eventually force the Supreme Court to grant certiorari on what would be its first predatory pricing case.<sup>62</sup> The economic and cost-oriented approach of the majority opinion in *MCI* is in agreement with the Second Circuit’s opinion in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*<sup>63</sup> In rejecting predatory pricing claims based solely on evidence that prices were below FDC, the Second Circuit stated:

Adopting marginal costs as the proper test of predatory pricing is consistent with the pro-competitive thrust of the Sherman Act. When the price of a dominant firm’s product equals the product’s marginal costs, “only less efficient firms will suffer larger losses per unit of output; more efficient firms will be losing less or even operating profitably.” . . . Marginal cost pricing thus fosters competition on the basis of relative efficiency. Establishing a pricing floor above marginal cost would encourage underutilization of productive resources and would provide a price “umbrella” under which less efficient firms could hide from the stresses and storms of competition.<sup>64</sup>

In contrast to the Seventh and Second Circuits, which relied on rules derived from microeconomic theory, the Ninth Circuit has taken an entirely different approach in determining the permissible pricing level of a dominant firm. Breaking from its original approval of the Areeda-Turner rule,<sup>65</sup> the Ninth

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60. *MCI*, 708 F.2d at 1124-25.

61. *Id.* at 1178.

62. The Supreme Court denied certiorari in *MCI* on October 11, 1983. *See supra* note 1. The Supreme Court’s only reference to predatory pricing came in a price discrimination case where the court held that the jury was entitled to consider the impact on the plaintiff that is forced to lower its prices due to the defendant’s predatory pricing. *Utah Pie Co. v. Continental Baking Co.*, 387 U.S. 685, 698-99 (1967).

63. 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982).

64. *Id.* at 87.

65. *See* *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 742 n.27 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

Circuit fashioned a unique rule in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*<sup>66</sup> In *Inglis*, the court held that a defendant could be guilty of predatory pricing even if prices were above its variable or marginal costs. In rejecting per se rules of liability, the court created a set of complex, shifting presumptions:

[T]o establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing [that] defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.<sup>67</sup>

*Inglis* has been applied and extended by the Ninth Circuit in *D&S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*<sup>68</sup> and *Transamerica Computer Co. v. IBM Corp.*<sup>69</sup> In *D&S Redi-Mix*, the Ninth Circuit held predatory the generous provision of credit from a parent corporation to its subsidiary even though the resulting price was not consistently below cost.<sup>70</sup> In *Transamerica Computer*, the court went even further and held that prices could be predatory even if they were *above the average total cost* of the product or service in question.<sup>71</sup> The court stated that it was prepared to find both limit pricing and non-profit maximizing pricing strategies as violations of the Sherman Act.<sup>72</sup>

The implications of the Ninth Circuit decisions are staggering. These cases specifically avoid the creation of any zone of activities in which the pricing behavior of a dominant firm is beyond judicial inquiry.<sup>73</sup> The attitude of the Ninth Circuit in this regard is irreconcilable with that of the Second and Seventh Circuits, the differences stemming from fundamental disagreements over the hazards of monopoly power. An opinion such as *Transamerica Computer* suggests an overriding concern with the abuse of monopoly power, and emphasizes the need to be vigilant in the scrutiny of

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66. 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 58 (1982).

67. *Id.* at 1035-36.

68. 692 F.2d 1245 (9th Cir. 1982).

69. 698 F.2d 1377 (9th Cir. 1983).

70. 692 F.2d at 1248.

71. 698 F.2d at 1386-88.

72. *Id.* The court found both the practices of limit pricing and non-profit maximizing pricing to be deterrents to new entrants into the market and, thus, violative of the Sherman Act because of their exclusionary results. *Id.* at 1387.

73. *Id.* The practical result of this rule is to virtually prohibit summary judgment for either the plaintiff or the defendant. Under the Ninth Circuit rule, even if a defendant's prices are below average variable cost it could still attempt to justify the prices, a result barred by the Areeda and Turner rule. See *supra* note 8 and accompanying text.

monopolistic practices. On the other hand, both *Northeastern Telephone* and *MCI* suggest a tolerance of firms with substantial monopoly power when the economies of scale dictate that such firms are the most efficient producers of a product or service. With this split among the circuits, it is time for the Supreme Court to end its long silence and unify the law of predatory pricing under Section 2 of the Sherman Act.

#### D. The Fallacy of the Search for a Universal Rule

Predation is fast becoming the key concept in the law of monopolization. Some commentators declare that the courts are immersed in the "third wave" of cases under section 2 of the Sherman Act, where monopoly power will be found unlawful only if the existence of monopoly power is accompanied by some objectively defined bad act.<sup>74</sup> The existence of predatory pricing is already one of the most common allegations raised to fulfill the requirement of finding a "bad act" in monopolization cases.

With some notable exceptions,<sup>75</sup> each of the commentators addressing the issue of what constitutes unlawful predatory pricing has proposed "universal" rules which consist of single standards usually involving price-cost comparisons.<sup>76</sup> These rules are largely a response to Areeda and Turner's attempt to formulate a rule that is responsive to economic theory, yet capable of judicial application. Each of these rules, however, serves unsatisfactorily as a universal gauge of predatory pricing. The Chicago approach,<sup>77</sup> which advocates no rule at all, is an analytically sterile denial of the existence of the problem. It is simply too late in the American antitrust experience to deny that predation is a legitimate subject for judicial inquiry, given a consistent legislative condemnation of pricing strategies which are perceived as being destructive of competition.<sup>78</sup>

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74. See, e.g., Sullivan, *Monopolization: Corporate Strategy, The IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587 (1982); Flynn, *supra* note 53, at 30.

75. See Dirlam, *supra* note 11 (advocating a case by case analysis); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976) (advocating judicial analyses of effect and intent rather than use of simple cost rules); Sullivan, *supra* note 74.

76. The numerous competing rules are described and analyzed in Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981), and Calvani and Lynch, *supra* note 5.

77. Essentially, advocates of the Chicago School approach to antitrust jurisprudence consider the motivation to injure or remove a competitor by pricing below cost to be irrational absent strategic considerations leading to a corporate takeover. See, e.g., R. BORK, *THE ANTI-TRUST PARADOX* 160 (1978) ("the law [of predatory pricing] perceives threats to competition where none exists"); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

78. Pricing strategies such as rebates, discriminatory preferences, and localized price cutting to suppress competition were among the perceived practices used by the nineteenth century trusts to gain control of the production and distribution of given markets. The intent to prevent such practices from being used anticompetitively formed the background for the passage of the Sherman Act itself. The classic expression of these concerns is found in *Standard Oil*

The majority of the suggested rules recognize the existence of at least limited instances in which predatory pricing is a rational business strategy.<sup>79</sup> Due to the recognition that some price reductions are pro-competitive, proponents of these rules seek to determine the legality of price cuts by applying various economic tests which attempt to divide lawful conduct from per se violations of the Sherman Act.<sup>80</sup> While it is beyond the scope of this article to analyze critically the economic foundations of each of these rules, it is contended that the attempts to find a universally applicable rule have done more harm than good.

Particularly in light of the enormous influence the professional literature has had on judicial attitudes regarding the antitrust laws, the proliferation of such rules constitutes a grave threat to the judicial decision-making process. Judges in predatory pricing cases are now looking to a bewildering maze of academic jargon, each piece articulating seemingly objective, but in reality, mutually exclusive, tests to determine whether price cutting is in fact unlawful. The wholehearted subscription to any of these economic rules can represent a dangerous, even if well-intentioned, abdication of judicial responsibility. If judges were to rely on one particular theory, the interpretation of antitrust laws promulgated nearly a century ago would be consigned to modern day academicians, rather than to a court of law. Once all intent evidence is excluded, or relegated to peripheral status, as so often occurs under the proposed economic tests for predatory pricing, the judge and jury would be left adrift in a sea of opposing economic experts and commentators with conflicting, esoteric viewpoints.<sup>81</sup>

When a judge adopts any of the purely economic predatory pricing rules as the sole expression of antitrust law, that judge has implicitly entered his vote in the battle that still rages over the proper goals of the antitrust laws.<sup>82</sup> In addition, total reliance on any economic rule raises fundamental questions about the role of the jury in antitrust cases. If the law of predatory pricing transforms itself into an exercise in applied industrial organization economics, then the line separating questions of law and fact will be redrawn,

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Co. v. United States, 221 U.S. 1 (1911). These concerns were also the subject of the Robinson-Patman Act, 15 U.S.C. § 13 (1976 & 1980 Supp.), which barred price discrimination. In addition to federal law, virtually all states have antitrust statutes which explicitly parallel federal antitrust laws, and several states have more specific statutes addressing pricing strategies. See generally Waxman, *Wisconsin's Unfair Sales Act—Unfair to Whom?*, 66 MARQUETTE L. REV. 293, 295-96 nn.18-19 (1983) (noting passage in several states of versions of the Robinson-Patman Act as well as unfair sales acts).

79. Brodley & Hay, *supra* note 76, at 757-64; Calvani & Lynch, *supra* note 5, at 382-97.

80. *Id.*

81. In *MCI*, for example, each side offered diametrically opposed testimony. Dr. William Melody argued that pricing below fully distributed cost was predatory, while Dr. William Baumol argued at length that only prices below long-run incremental cost could be considered predatory. A presumably exasperated Judge Grady declared the entire issue a question of fact and sent the matter to the jury. See *supra* notes 20-24 and accompanying text.

82. See Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

diminishing the role of the jury in the process. There will be little left for the fact finder to do if, as a matter of law, pricing is found unlawful when prices are below a certain measure of cost and lawful when above that same measure.

Most importantly, for a court to adhere to any of these exclusively economic tests falsely suggests that the pro- or anti-competitive effects of business behavior can be measured in precisely the same fashion for every firm and every industry. Industries differ greatly in structural characteristics such as the elasticity of demand, the growth or diminution of the market, the ratio of fixed to variable costs, and the pace of emerging technology rendering a current plant obsolete. Furthermore, firms within a given industry differ in their productive efficiency, extent of excess capacity, and their composition of costs. It is preposterous to assume that the consequences of actions taken by firms with such widely divergent characteristics can be ascertained accurately through any single price-cost comparison.

A finding of monopolization should therefore rest in part on economic tests geared to the particular firm and industry in question. But there is no persuasive reason why these tests should be determinative. In addition to price evidence, the judge will normally have at his disposal a variety of noneconomic data, largely falling under the rubric of "intent" evidence. Such evidence is relevant to any judicial decision, and is certainly probative of the intentions of the human actors whose pricing decisions are under scrutiny.<sup>83</sup> Examination of both cost and intent evidence appears to be the most effective and complete method of ascertaining the legality of behavior, such behavior normally being unascertainable when measured only by a single set of economic criteria.

However, total reliance on a case-by-case approach overlooks the fact that the vast majority of price reductions represent healthy, vigorous price competition and are entirely beyond the purview of the antitrust laws. To permit judicial scrutiny of any and all price reductions runs counter to one of the avowed purposes of the antitrust laws, which is to promote price competition.<sup>84</sup> Furthermore, it deprives the businessman of any certainty in operating his enterprise and wastes an enormous amount of both public and private resources in litigation. In this regard, it appears that no cause of action should exist whenever a defendant's prices are above an economically relevant measure of average total cost.<sup>85</sup>

Neither the majority nor the dissent in *MCI* took a hard line on what standard to apply in predatory pricing cases. The majority, while opting for reliance on an economic test for predatory pricing, acknowledged that its

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83. See L. SULLIVAN, *supra* note 11; Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1229 (1977).

84. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

85. This is the result in *MCI*, where the majority chose the cost measure which most closely approximated an economist's definition of the average total cost of one product in a multiproduct firm. 708 F.2d at 1114-98.

choice of cost standards was dictated, in part, by the facts of the case.<sup>86</sup> In addition, the majority refused to take the further step of holding that intent evidence was either irrelevant or inadmissible.<sup>87</sup> Even the dissent, while arguing for a broader inquiry based on noneconomic factors, conceded that prices in excess of certain economic standards represent no threat to competition, and therefore should be conclusively lawful.<sup>88</sup>

Arguably, there are two types of predatory pricing cases in which purely economic criteria should be determinative. First, price-cost comparisons should conclusively determine liability in cases where the plaintiff's sole evidence of predation is the pricing behavior of the defendant. When a litigant stakes its entire case on empirical economic data, it is certainly fair to judge such evidence by rigorous economic standards.

The second category of cases in which economic tests of predation should be determinative concerns allegations of predatory pricing in attempted monopolization cases. In attempted monopolization cases, the defendant lacks monopoly power by definition.<sup>89</sup> Typically, the market shares of these defendants are quite low.<sup>90</sup> Under such circumstances, it is important to emphasize the pro-competitive aspects of price reductions. Thus, any claim that price reductions have anti-competitive effects should be permitted to proceed only when such claims are supported by solid economic evidence that the price cuts serve to reduce, rather than promote, competition in the long run.

The importance of rigorous economic analysis in attempted monopolization cases is underscored by the tendency of courts to use a finding of below-cost pricing to infer the other elements of the offense of attempted monopolization. While the textbook elements of an attempt to monopolize are specific intent, unlawful or exclusionary conduct, and a dangerous probability of success,<sup>91</sup> some courts have simply presumed the other elements once the defendant is found to have engaged in below-cost pricing.<sup>92</sup> Because this determination is crucial, it is reasonable to insist that courts utilize a rigorous economic definition of cost; otherwise, drastic legal consequences might flow from economically ambiguous pricing behavior. In these limited circumstances, exclusive reliance on the Areeda-Turner rule is appropriate,

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86. *Id.* at 1120.

87. *Id.* at 1123 n.58.

88. *Id.* at 1176-77 (J. Wood, dissenting).

89. See *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

90. See, e.g., *Robert's Waikiki U Drive, Inc. v. Budget Rent-a-Car Sys.*, 491 F. Supp. 1199 (D. Hawaii 1980) (defendant's market share less than 25%).

91. See generally *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Swift & Co. v. United States*, 196 U.S. 375 (1905).

92. *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 737 (9th Cir. 1979); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 453 & n.47 (9th Cir. 1979); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Marquis v. Chrysler Corp.*, 577 F.2d 624, 641 (9th Cir. 1977); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).



given the view that there can be no pro-competitive value to pricing below short-run marginal or variable cost.

## II. THE ESSENTIAL FACILITIES DOCTRINE

Despite the prominence of the predatory pricing allegations in *MCI*, the Court also resolved a series of charges that AT&T had unlawfully refused to interconnect MCI with its local distribution facilities.<sup>93</sup> The Seventh Circuit's unanimous affirmance of all but one of the findings of liability on this issue<sup>94</sup> hinged on its application of the so-called essential facilities doctrine. Unlike the typical rule which allows a firm to unilaterally choose its customers as it wishes,<sup>95</sup> the essential facilities doctrine, also called the "bottleneck principle," requires a monopolist controlling a scarce resource to deal with all those requesting access to the facility on reasonable terms.<sup>96</sup> This obligation, akin to that of a common carrier, is imposed to prevent a monopolist from using its control of one stage of production to extend its monopoly power into adjacent markets.<sup>97</sup>

Liability under the essential facilities doctrine is established upon proof of: (1) control of the essential facility by a monopolist; (2) a competitor's inability to practically or reasonably duplicate the facility; (3) the feasibility of providing a competitor access to the facility; and (4) the denial of the use of a facility to a competitor.<sup>98</sup> In the leading Supreme Court case establishing liability under this theory, *Otter Tail Power Co. v. United States*,<sup>99</sup> the Court affirmed a grant of injunctive relief against a utility which used its control of transmission facilities to maintain its monopoly by refusing to sell or wheel power to towns which created their own electricity

93. Because MCI only provided microwave transmission over *intercity* circuits, the company required physical interconnections in both the transmitting and the receiving cities in order to complete a long-distance call from the office or home of the sender to that of the receiver. MCI alleged that AT&T unlawfully refused to provide these interconnections. For other related allegations, see *infra* notes 103-106 and accompanying text.

94. The court unanimously refused to impose liability for AT&T's denial of multipoint interconnections. See *infra* notes 106-07 and accompanying text.

95. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

96. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.D.C. 1977) (quoting A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES* 67 (2d ed. 1970)). The *Hecht* court also quoted from Professor Sullivan's definition of the essential facilities doctrine as follows:

[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, nondiscriminatory terms.

L. SULLIVAN, *supra* note 11, at 131 (quoted in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 n.36 (D.D.C. 1977)). For a discussion of the bottleneck theory, see Comment, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1722 (1974).

97. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

98. 708 F.2d at 1132-33; *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

99. 410 U.S. 366 (1973).

distribution systems.<sup>100</sup> While *Otter Tail* does provide an analogy to the *MCI* case, an important difference must be noted. The essential facilities doctrine was used by the court in *MCI* to support a treble damage award rather than, as in *Otter Tail*, a prospective injunction. Since the *MCI* court remanded the case for a new trial on the issue of damages counts only,<sup>101</sup> the Seventh Circuit's affirmance of treble damage liability based on the essential facilities doctrine is particularly significant.<sup>102</sup>

The court in *MCI* held that the facilities which AT&T controlled, the local telephone systems in metropolitan areas, were essential because traditionally local telephone service has been classified as a natural monopoly.<sup>103</sup> A potential competitor in long-distance service would be economically unable to duplicate the miles of cable and wire necessary to provide intracity phone service. Furthermore, the competitor would also be unable to obtain regulatory approval to do so.<sup>104</sup> The court held that AT&T refused to provide interconnections in order to injure MCI as a competitor, and that no legitimate business, regulatory, or technical reasons existed to excuse AT&T's refusal to interconnect MCI with its local facilities.<sup>105</sup> Consequently, the court found that AT&T had a duty to provide MCI with access to its interconnections, thereby enabling MCI to enter the long-distance telephone market and attempt to compete with AT&T.<sup>106</sup>

MCI's claim for "multipoint interconnections" provides an interesting example of the dangers of an overly expansive utilization of the essential facilities doctrine in treble damage litigation. The court rejected MCI's interpretation of the doctrine by refusing to affirm liability for AT&T's denial of the multipoint interconnections. As an illustration, the need for multipoint interconnections exists where MCI has a private line circuit running from City A to City B, and AT&T has a private line circuit running from City B to City C. A multipoint connection would connect the MCI and AT&T circuits at City B, allowing an MCI customer to place a call directly from City A to City C, with each carrier receiving revenue for its portion of the circuit used in making the call.

Unlike its holding with regard to the other interconnections, the court did not hold AT&T liable for its refusal to provide such multipoint interconnections to MCI. The court reasoned that unlike connections for *intracity* service, MCI had both the ability and the right to build circuits to serve long-distance markets it presently did not serve.<sup>107</sup> Thus, multipoint interconnections were not essential. The court went on to express its concern that the FCC may not have intended to impose the obligation on AT&T to assist

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100. *Id.* at 382.

101. *Id.* at 1166-67.

102. For a discussion of the implications of such an expansive view of the essential facilities doctrine, see *infra* notes 110-12 and accompanying text.

103. 708 F.2d at 1133.

104. *Id.*

105. *Id.*

106. *Id.* at 1147.

107. *Id.* at 1148.

MCI in competing for long-distance business in areas where MCI could have, but had not, made any significant capital investment.<sup>108</sup>

The majority opinion suggests a rather strict reading of the requirements for application of the essential facilities doctrine in order to impose treble damage liability. According to the court's analysis in *MCI*, a new entrant will have to demonstrate its substantial entry into the market and its inability to duplicate the required facilities, for either economic or regulatory reasons, before the court will impose liability on the monopolist for its failure to provide access to the facilities it controls. In addition, it appears that the dominant firm must have a natural monopoly, or maintain a bottleneck at one stage of production, before the essential facilities doctrine will apply. It is doubtful that a showing of the dominant firm's mere competitive advantage will suffice to meet this burden of proof under the essential facilities doctrine.<sup>109</sup>

The court's strict construction of the essential facilities doctrine stemmed mostly from the fact that treble damage liability was at stake in *MCI*. A finding of liability under the essential facilities doctrine becomes far more plausible when viewed in the context of a request for injunctive relief.<sup>110</sup> Since injunctive relief sought in that context is prospective, courts will not be concerned about the imposition of massive monetary damages for past conduct that was the result of either an innocent mistake of judgment or of the defendant's misreading of its legal obligation.<sup>111</sup> In addition, the stan-

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108. *Id.* at 1149. The court acknowledged the serious consequences that would result from the imposition of liability under such a theory:

As a matter of antitrust liability . . . can an entrant which actually builds its own facilities between Chicago and Milwaukee, for example, thereby gain entitlement to use all the far-flung facilities of the Bell System? Is its entitlement based on its expressed intention to duplicate major portions of the Bell System on a national basis? Could it claim entitlement before (or without) building any facilities of its own?

*Id.*

109. Absent regulatory requirements, it appears that the court will not impose treble damage liability unless the firm denying access to the facilities has achieved a natural monopoly as a result of its control over the facilities. This position is a retreat from previous Supreme Court cases which can be construed as requiring only that the denied facility confer upon the established firm a unique competitive advantage. See *Associated Press v. United States*, 326 U.S. 1 (1945). It is unclear whether the *MCI* court would have insisted on such a strict rule if the plaintiffs had sought only injunctive relief. See *infra* notes 105-06 and accompanying text.

110. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

111. For example, in *MCI* the obligation of AT&T to provide the requested interconnections stemmed from a broad reading of the FCC's 1971 decision in *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), which was described by the district judge as an "abomination" and "one of the worst examples of legal draftmanship I have ever seen." 708 F.2d at 1095 n.13. The *Specialized Common Carriers* decision declared that public policy required open competition in the specialized long-distance services markets. The FCC did not define, however, which specialized services the decision covered. AT&T interpreted the decision to apply only to single point private line connections, while MCI interpreted the decision to include foreign exchange lines and multipoint interconnections, as well as single point connections. *Id.* at 1095. Further complicating matters was the FCC's previous position, taken in a brief filed in the Ninth Circuit, that AT&T was not obligated to provide the interconnections. It was not until 1974 that the FCC conclusively ordered AT&T to provide interconnections. See *Bell System Tariff Offer-*

dards for injunctive relief require a showing of irreparable injury as well as a balancing of hardships,<sup>112</sup> thereby permitting a court to assess the extent of the competitor's entry into the market and the extent of the competitor's "free ride" on the dominant firm's facilities before mandating access to the essential facility.

### III. DAMAGES

#### A. Causation and Disaggregation

Another principal feature of *MCI* is the court's discussion of the elements necessary to prove both *causation* of damages and the *amount* of damages. In its complaint, MCI charged AT&T with twenty-two types of actions constituting monopolization.<sup>113</sup> The district court granted summary judgment in favor of AT&T on seven of these counts.<sup>114</sup> The jury found for MCI on ten of the remaining counts and in favor of AT&T on five of the counts.<sup>115</sup> For these violations, the jury awarded MCI \$600 million, which was trebled to produce a damage award of \$1.8 billion.<sup>116</sup>

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ings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C.2d 413, *aff'd sub nom.* Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

112. *Cf.* *Dos Santos v. Columbus-Cuneo-Cabrini Med-Center*, 684 F.2d 1346, 1349 (7th Cir. 1982) (plaintiff's likelihood of success on the merits, the threat of irreparable harm to plaintiff, the potential harm to defendant if relief is granted, and the public interest in the resolution of the dispute are four factors that a court must address in determining the propriety of preliminary injunctive relief).

113. 708 F.2d at 1092. The court divided the 22 types of actions into the categories of predatory pricing, denial of interconnections, negotiation in bad faith, and unlawful tying. *Id.*

114. The district court directed a verdict in favor of AT&T on the claims alleging that AT&T was guilty of the following:

- (1) inducing Western Union to file a tariff which mirrored the St. Louis-Chicago charges of MCI;
- (2) increasing AT&T's capacity to conduct business in data communications for the purpose of destroying competition;
- (3) introducing experimental service to discourage potential customers from dealing with MCI;
- (4) disparaging MCI;
- (5) bringing sham proceedings before certain administrative and judicial bodies;
- (6) participating in a massive public propaganda campaign conducted against MCI; and
- (7) refusing to provide Joint Telpak (a special tariff offering available to large telephone consumers, i.e., the federal government) to MCI.

*Id.* at 1092 n.5.

115. The jury found AT&T guilty of the following: refusing FX and CCSA interconnections to MCI; tying; disconnecting MCI's customers; denying multipoint interconnections; unreasonably limiting the geographic scope of those interconnections actually provided; providing inappropriate or inefficient equipment; negotiating in bad faith with MCI; filing state tariffs in bad faith; predatory pricing of its Hi-Lo service; and unlawful pre-announcement of Hi-Lo. The jury found for AT&T on allegations of discriminating against MCI on interconnection charges; charging MCI unreasonably high prices for interconnections; late or faulty installations; interfering with MCI's financing; and predatory pricing of Telpak. *See id.* at 1207-09 app. (setting forth the jury's special verdict).

116. *Id.* at 1093.

MCI's proof of damages consisted of the introduction of a lost-profits study accompanied by supporting testimony.<sup>117</sup> The study compared the revenues earned by a hypothetical MCI, undamaged by any of the alleged anticompetitive acts of AT&T, with the revenues actually earned by MCI. The data regarding the "undamaged" MCI were derived from the forecasts contained in the original business plans of the corporation.<sup>118</sup> The data regarding the "damaged" MCI came from the actual financial performance of the corporation including projections into the future.<sup>119</sup> The differences in profitability between these two models were computed on a yearly basis and then reduced to a present value.<sup>120</sup>

AT&T attacked the lost-profits study on two separate grounds. First, AT&T argued that the lost-profits study improperly included damages for losses that stemmed from both the *lawful* and the *unlawful* acts of AT&T.<sup>121</sup> AT&T also argued that the study was based upon erroneous assumptions that had no support in the record.<sup>122</sup> Specifically, AT&T challenged the assumptions that MCI could have earned eighty-five cents per circuit mile per month;<sup>123</sup> that MCI would have had thirty-seven million circuit miles in place prior to 1975;<sup>124</sup> and that MCI could have obtained financing for their contemplated system.<sup>125</sup> MCI argued in response that it was not required to "disaggregate" its proof of the amount of damages where lawful conduct was intertwined with unlawful acts, and it presented further arguments in defense of the various assumptions used in its study.<sup>126</sup>

The court held that MCI's lost-profits study was insufficient because it lacked a proper foundation and was based upon insupportable assumptions.<sup>127</sup> The court also held that the study failed to address the question of causation of the damages it claimed. The court noted that the study, which was prepared well in advance of trial, was based upon the assumption that all of the acts listed in MCI's complaint would in fact be held unlawful.<sup>128</sup> Thus, the study set forth alleged lost profits based on twenty-two acts, of which only eight were subsequently found to be unlawful.<sup>129</sup>

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117. *Id.* at 1160-61, 1164.

118. *Id.* at 1160-61. These forecasts were modified because of certain events unattributable to AT&T. *Id.*

119. *Id.*

120. Using this method of computation, MCI asked for damages totalling \$900 million before trebling. *Id.*

121. *Id.*

122. *Id.*

123. Brief for Appellant at 162-63, *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

124. *Id.* at 163-64.

125. *Id.* at 165-67.

126. Brief for Appellee at 146-53, 160-83, *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

127. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1164-65 (7th Cir. 1983).

128. *Id.* at 1163.

129. Among the lawful acts included in MCI's lost-profits study were the pricing strategies

The lost-profits study was therefore rejected by the court because it improperly calculated damages based on both lawful and unlawful acts, and did not permit a fact finder to make a reasonable and principled estimation of the damages flowing from the unlawful conduct of the defendant.<sup>130</sup> The court's language on this point was unequivocal:

It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant. . . . Once *causation* of damages has been established, the *amount* of damages may be determined by a just and reasonable estimate as long as the jury verdict is not the product of speculation or guess work.<sup>131</sup>

The court concluded that given the significance of the acts judged to be lawful, "it would be unjust and contrary to the policies of the treble damage remedy to award MCI damages which may compensate it for the effects of such quantitatively significant *lawful* competition."<sup>132</sup>

If read literally, the majority opinion would limit the common law rule against requiring strict disaggregation<sup>133</sup> to only those situations in which the plaintiff had proved that all of the alleged antitrust violations were, in fact, unlawful acts. Thus, the plaintiff would have to disaggregate its damages to prove the specific dollar amounts of injury caused by each of the separate unlawful acts.<sup>134</sup> If the opinion is interpreted in such a strict manner, *MCI* represents a substantial departure from the previous rule announced by the

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for both Telpak and Hi-Lo, which constituted some of the major competitive handicaps for MCI to overcome in entering the market. See *infra* note 123 and accompanying text.

130. 708 F.2d at 1162-63.

131. *Id.* at 1161 (emphasis in the original).

132. *Id.* at 1164. Several circuit courts of appeals have similarly overturned damage awards which compensated for both lawful and unlawful competition. See, e.g., *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied sub nom. Murphy Tugboat Co. v. Shipowners & Merchants Tugboat Co.*, 455 U.S. 1018 (1982); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); see also *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa. 1981) (plaintiff's lost-profits study made no provision for effects of lawful competition); *ILC Peripheral Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978) (plaintiff's damage evidence deemed too speculative because no explanation given for factors other than defendant's allegedly unlawful conduct), *aff'd per curiam sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

For example, the Third Circuit in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975), ordered a new trial because the evidence showed that damages had been based, in part, on conduct that had been found to be lawful. The plaintiff, a former independently-owned dealer who complained of discrimination in favor of factory-owned dealerships, offered expert testimony which purported to calculate the volume of sales which would have been expected if no factory dealerships had been established. *Id.* at 1351-52. The court held that the failure to account for lawful competition from the factory dealers required reversal and a new trial because of the potentially significant effect on the amount of damages. *Id.* at 1353.

133. Cases which support a rule against the disaggregation of damages include *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

134. 708 F.2d at 1162.

Seventh Circuit in *Spray-Rite Service Corp. v. Monsanto Co.*<sup>135</sup> In *Spray-Rite*, a ten million dollar treble damage award was challenged on the basis that the plaintiff had failed to quantify the amount of damage caused by each of the challenged practices.<sup>136</sup> The court rejected this theory, relying on the familiar proposition that a successful antitrust plaintiff need not prove with precision the amount of damages attributable to each unlawful practice of the defendant.<sup>137</sup> Under the authority of *Spray-Rite*, a plaintiff is under no absolute duty to disaggregate its proof of the amount of damages in order to recover. The court stated that if the plaintiff can show that disaggregation is impracticable, the burden then shifts to the defendant to show the contrary.<sup>138</sup>

The *Spray-Rite* court went on to address the point that the total aggregated damages forced the defendant, Monsanto, to compensate *Spray-Rite* for lost profits caused by purely lawful competition.<sup>139</sup> Monsanto contended that it was impossible to determine whether the jury had found all of Monsanto's distribution policies unlawful.<sup>140</sup> The court dismissed this contention by simply repeating the disaggregation theory it had relied on earlier. The court noted that the jury had found at least one of Monsanto's practices to be unlawful, and permitted full recovery despite the fact that two of the three allegedly unlawful practices may have been perfectly legal.<sup>141</sup>

*Spray-Rite* thus addresses as a matter of disaggregation what *MCI* describes

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135. 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3627 (U.S. March 1, 1983) (No. 82-914) (certiorari granted on issues unrelated to the damage issues discussed in this article); *see also* *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 483-84 (7th Cir. 1980) (fact finder may use probability and inference in determining damages in a refusal to deal case).

136. 684 F.2d at 1242. The allegations included resale price maintenance, group boycotts, and unlawful distribution policies relating to dealer compensation, shipping, and assignments of territories.

137. *Id.* at 1242; *see* *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

138. 684 F.2d at 1242-43.

139. *Id.* at 1243.

140. Monsanto based its argument on an interrogatory, answered in the affirmative by the jury, which it felt was ambiguously worded. The interrogatory was put to the jury as follows:

Were the compensation program *and/or* areas of primary responsibility, *and/or* shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

*Id.* at 1243 n.12 (emphasis in original). Monsanto had requested that the interrogatory be phrased in the conjunctive, but the court inserted the *or* at *Spray-Rite*'s request.

141. *Id.* at 1243. The opinion stated:

Clearly, *Spray-Rite* is entitled to recover the lost profits caused by Monsanto's anti-competitive business practices. We will not deprive *Spray-Rite* of this recovery merely because the jury may have found that Monsanto combined lawful conduct with unlawful conduct making it impossible to determine which portion of the total damages was caused by the unlawful conduct.

*Id.*

as proof of causation. These two concepts, however, are distinct from one another. It makes sense, from the standpoint of successful antitrust enforcement, to prevent a defendant from avoiding a treble damage award simply because the plaintiff's losses escape precise quantification. To allow such an escape, by requiring the plaintiff to disaggregate its damages, would render the defendant unaccountable for its unlawful acts.<sup>142</sup> In its simplest form, the rule against requiring disaggregation states that a plaintiff need not separately calculate the amount of damages caused by each of the defendant's unlawful actions. A plaintiff still must prove, however, that its losses were in fact caused by the allegedly unlawful acts. A plaintiff has no right to collect damages, let alone treble damages, for losses due to lawful competition. Any losses that flow from such legitimate competitive practices cannot constitute compensable antitrust injury.<sup>143</sup> This distinction between causation and disaggregation was recognized in *Bigelow v. RKO Radio Pictures, Inc.*,<sup>144</sup> in which the Supreme Court stated that the rule against requiring disaggregation only comes into play *after* proof that the harm was caused by the wrongful acts of the defendant.<sup>145</sup>

The majority in *MCI* tried to reconcile its holding with that of *Spray-Rite* in a number of ways.<sup>146</sup> First, the majority opinion in *MCI* gives an extremely narrow reading to *Spray-Rite* as a result of the factually peculiar situation in that case. In *Spray-Rite*, the court had to construe an ambiguously drafted special interrogatory which made it impossible to determine whether the jury found liability for one act or for three acts of the defendant.<sup>147</sup> The *Spray-Rite* court's statement that there was substantial evidence to support the verdict on all three counts is consistent with a rule requiring strict proof of causation.<sup>148</sup>

*Spray-Rite* retains a great deal more vitality once another factual distinction from *MCI* is realized. In *Spray-Rite*, the principal anti-competitive prac-

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142. As the Supreme Court stated in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946):

Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

143. "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick v. Pueblo Bowl-o-Mat*, 429 U.S. 477, 489 (1977) (emphasis in the original).

144. 327 U.S. 251 (1946).

145. *Id.* at 264.

146. *MCI*, 708 F.2d at 1163-64.

147. 684 F.2d at 1233; see *supra* note 132.

148. 684 F.2d at 1242 n.11. But see *MCI*, 708 F.2d 1081, 1188-89 (7th Cir. 1983), where Judge Wood argued that the *Spray-Rite* court explicitly prefaced its disaggregation argument by assuming, arguendo, that at least one of the challenged practices was indeed lawful. See also *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980) (damages in a refusal to deal case may be inferred from a decline in profits once it is shown that such a decline was proximately caused by defendant's wrongful act).



tice at issue was an unlawful dealer termination pursuant to a conspiracy to fix resale prices.<sup>149</sup> The practices that were the subject of the special interrogatory—restrictive shipping, compensation, and territorial policies—were alleged to have been part of the same conspiracy. From the plaintiff's point of view, these practices were of relatively minor significance in comparison to the termination and subsequent boycott of the plaintiff.<sup>150</sup> Thus, in *Spray-Rite*, little harm was done by awarding aggregate damages which may have included some minor elements of lawful conduct by the defendant. In contrast, the jury in *MCI*, and later the reviewing court, expressly found the conduct lawful which the plaintiff had alleged to be one of the principal sources of its damages.<sup>151</sup> For example, the Telpak tariff, which the jury found non-predatory, was perhaps the largest single element in *MCI*'s case since Telpak supposedly prevented *MCI* from selling to the largest users of long-distance services.<sup>152</sup> In addition, the Seventh Circuit found that AT&T's Hi-Lo was lawfully priced, thereby rejecting *MCI*'s argument that it unlawfully prevented *MCI* from serving smaller customers as well.<sup>153</sup> Therefore, it is not surprising that the Seventh Circuit in *MCI* rejected evidence of damages which failed to account for the effect of such devastating, but lawful, competition.

Nonetheless, *Spray-Rite* and *MCI* remain at odds over which party has the burden of proof on issues of causation and disaggregation. The *Spray-Rite* court held that when disaggregation is possible, the plaintiff must produce particularized damage evidence which relates its alleged losses to the individual unlawful acts of the defendant.<sup>154</sup> *Spray-Rite* also holds that when a successful plaintiff comes forward with evidence that disaggregation is not possible, then the burden should shift to the defendant to prove that disaggregation was possible.<sup>155</sup> On the other hand, *MCI* holds that, at least where the lawful competition is "quantitatively significant," the burden of proof should remain on the plaintiff to show that its losses stemmed from purely unlawful practices of the defendant.<sup>156</sup> Since it appears that *Spray-Rite* and *MCI* suggest differing burdens of proof on the issue of causation and disaggregation, depending both on the quantitative impact of the various lawful and unlawful acts of the defendants and on the impracticability of requiring the plaintiff to prove precise damages, the definitive resolution of this question awaits further clarification.

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149. 684 F.2d at 1238-40.

150. *Id.* at 1236-37.

151. 708 F.2d at 1164. The significance of the jury finding that Telpak was lawfully priced is underscored by the fact that Telpak constituted over half the private line market. *Id.* In addition, Telpak was aimed at the very largest of the private line users, the federal government and private corporations, which *MCI* considered to be its own preferred market. *Id.*

152. The United States purchased over half the Telpak circuits. *Id.* at 1165-66.

153. *Id.* at 1164.

154. 684 F.2d at 1242-43; *see also* *Greene v. General Foods Corp.*, 517 F.2d 635, 655 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

155. 684 F.2d at 1243.

156. *MCI*, 708 F.2d at 1164.

## IV. THE PROCEEDINGS ON REMAND: A NEW TRIAL ON DAMAGES

The final portion of the *MCI* opinion constitutes the court's decision to remand for a new trial only on the issue of damages.<sup>157</sup> The court invoked Rule 42(b) of the Federal Rules of Civil Procedure<sup>158</sup> in remanding for determination of this issue. The opinion states that while a new trial on liability was unnecessary, a new trial on damages was required in light of the court's decision that AT&T had not engaged in predatory pricing.<sup>159</sup>

This determination, when read in conjunction with the court's opinion on proof of causation of damages, is a strong endorsement of bifurcated trials whenever complex multi-issue charges are raised in a complaint. Whenever lump sum damages are requested for a variety of allegedly unlawful acts, the plaintiff runs the risk of having the damage evidence deemed inadmissible if the jury, the trial court, or the reviewing court rejects the illegality alleged in any of the significant counts.<sup>160</sup> In such a case, under the rationale of *MCI*, a new trial on damages would be required unless the damage evidence was sufficiently precise to show which damages were caused by each act of the defendant.<sup>161</sup> Since such a showing is normally infeasible, an antitrust plaintiff will be left with two options. First, he can forego damages based on lost profits and present evidence of specific acts or practices by the defendant that have caused it to lose particular customers and have denied him access to specific market shares. While this approach may be practical in a case such as *MCI*, where the plaintiff sought to serve a discrete number of customers with extremely demanding needs,<sup>162</sup> such an approach represents an impossible burden in the more typical case which does not involve the competition for particular, identifiable customers. The practical alternative is thus a bifurcated trial where, after the liability issues have been resolved,

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157. *Id.* at 1166-69.

158. FED. R. CIV. P. 42(b) states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

159. The court stated:

A new trial on liability is unwarranted since this court has affirmed liability for monopolization on the basis of most of AT&T's actions involving interconnection with MCI. No new trial is required on those issues where we have set aside the findings at trial because our conclusion in these areas was based on a lack of evidence or other legal deficiency and not mere trial error. . . . A new trial on *damages* is required to reflect the determinations by the jury, and by this court, that AT&T's pricing policies were not predatory.

708 F.2d at 1166-67 (emphasis in original).

160. It is unclear whether a new trial would be required if a finding of liability on a relatively trivial issue were reversed on appeal. See *supra* notes 149-53 and accompanying text.

161. 708 F.2d at 1162-63.

162. MCI's original strategy required MCI to serve the members of the business and industrial community who needed extensive private line facilities for communications between various plants and offices. *Id.* at 1094.

the plaintiff can structure its proof of damages to reflect only those acts found to be unlawful.

While remand for a new trial on damages is not particularly novel in antitrust cases,<sup>163</sup> it does pose significant problems. First, the calculation of damages to be resolved on a partial remand must be sufficiently separate and distinct from the issues of liability so as not to prejudice the defendant.<sup>164</sup> In addition, to make the new trial on damages workable, the appellate court must be able to set forth with considerable specificity which issues remain unresolved, whether further discovery will be permitted, the effect of prior evidentiary rulings, and how much information concerning liability should be presented on remand so the jury may intelligently evaluate the evidence as to the amount of damages to be awarded.<sup>165</sup> Such guidance is inherently difficult to render because it forces the appellate court to predict the nature of a future proceeding which will depend, at least in part, on the strategic and tactical choices of the litigants. As a result of these concerns, the only absolute dictate of the Seventh Circuit's remand order in *MCI* was that any new MCI lost-profits study must include foundations for its assumptions and must make adjustments for losses flowing from competition which was found to be lawful.<sup>166</sup>

Apart from this command, the Seventh Circuit's guidelines for the damages trial consisted of broad suggestions subject to the discretion of the trial judge. This approach was made possible by the court's decision to remand the case to District Judge John Grady, who had acquired the familiarity necessary to apply such broad rules because of his experience in presiding over the original trial.<sup>167</sup> The Seventh Circuit recommended greatly limiting further

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163. Examples of cases in which the court remanded for a new trial on the issue of damages are *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964); *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118, 128-31 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982); *Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 538 (3d Cir. 1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 304-05 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 14-15 (2d Cir. 1975); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47-8 (5th Cir. 1972), *cert. denied*, 420 U.S. 929 (1975); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 159-61 (5th Cir. 1971), *after remand*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Cases in which the court ordered that the trial be bifurcated into a "liability" stage and a "damages" stage include *In re Ampicillin Antitrust Litigation*, 88 F.R.D. 174, 178-79 (D.D.C. 1980); *LoCicero v. Humble Oil & Ref. Co.*, 52 F.R.D. 28, 29-30 (E.D. La. 1971). *But see* *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976) (urging caution in the utilization of bifurcated trials in antitrust cases because of the potential for confusion between the determination of *fact* of injury in the liability phase and the determination of the *amount* of damages in the damages phase).

164. *See Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931) (facts concerning liability interwoven with facts concerning damages might lead to juror confusion resulting in denial of a fair trial).

165. *See MCI*, 708 F.2d at 1167-68.

166. *Id.* at 1168.

167. *Id.* at 1174. The court declined to apply Circuit Rule 18, which requires reassignment of a case after reversal and remand, so that Judge Grady could continue to preside over the case.

discovery, barring the relitigation of prior evidentiary rulings, and relying on stipulations to educate the jury on the liability issues of the case.<sup>168</sup> Finally, the court suggested the utilization of a special master to determine technical issues relating to the calculation of lost profits.<sup>169</sup>

Although the ultimate timing and structure of the further proceeding remain to be determined, there has already been great speculation as to the outcome of the case on remand. The Seventh Circuit's opinion, as well as public reaction and speculation as to the outcome on remand, have been widely reported.<sup>170</sup> Interestingly, both parties claimed vindication by the Seventh Circuit's decision. MCI claimed victory in the court's affirmation of AT&T's liability on most of the antitrust charges, and suggested that it would ultimately receive damages of equivalent magnitude as had been previously awarded.<sup>171</sup> AT&T, on the other hand, claimed victory in the overturning of the \$1.8 billion award, which with interest from the date of judgment had grown to over \$2 billion.<sup>172</sup> In addition, AT&T regarded the resolution of the predatory pricing claims in its favor as the dismissal of the principal allegation, thus eliminating the preponderance of damages that could be assessed against it on remand.<sup>173</sup>

Following the *MCI* decision, William McGowan, the president of MCI, stated that the spectacular post-1975 profitability of his company suggested that MCI could have earned even more but for AT&T's illegal interference.<sup>174</sup> On this basis, McGowan predicted that MCI would receive on remand damages at least as great as those awarded at the original trial.<sup>175</sup> McGowan's bold assertion, however, is implausible. The majority opinion rejected the original lost-profits study offered by MCI as untrustworthy and as based upon unreasonable assumptions not supported by the record.<sup>176</sup> The opinion

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168. *Id.* at 1168-69.

169. *Id.* at 1169 n.122. This suggestion was heavily qualified by the court's repeated statements that the matter was entirely within the discretion of the district court. *Id.* This delicate approach appears appropriate given the inherent conflicts between a special master and the fact finder, see FED. R. CIV. P. 53, and the potential for great delay in adding another level to the proceeding. See *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

170. See, e.g., Marbach, Ma & Ipsen, *Ma Bell's Antitrust Troubles*, NEWSWEEK, Jan. 24, 1983, at 55, col. 2; Carley, *Ruling in AT&T-MCI Case Indicates Courts Confusion on Predatory Pricing*, Wall St. J., Jan. 21, 1983, at 7, col. 1; Ackland, *Who Won AT&T-MCI Suit Not Clear as a Bell*, Chi. Tribune, Jan. 16, 1983, § 5, at 5, col. 2; Crawford & Ackland, *AT&T Antitrust Penalty Overturned*, Chi. Tribune, Jan. 13, 1983, § 1, at 1, col. 1; Possley, *\$1.8 Billion Award Against AT&T Voided*, Chi. Sun-Times, Jan. 13, 1983, at 1, col. 1; Richards & Williams, *Court Remands AT&T Verdict of \$1.8 Billion*, Wall St. J., Jan. 13, 1983, at 2, col. 2; Yates, *AT&T Ruling May Yet be Appealed*, Chi. Daily L. Bull., Jan. 13, 1983, at 1, col. 2; *Bell Wins Plea to Block Award of \$1.8 Billion*, N.Y. Times, Jan. 13, 1983, at 1, col. 5.

171. Marbach, Ma & Ipsen, *supra* note 170, at 55, col. 2.

172. Yates, *supra* note 170, at 1, col. 2.

173. *Id.* at 1, col. 5.

174. Marbach, Ma & Ipsen, *supra* note 170, at 55, col. 3.

175. *Id.*

176. *MCI*, 708 F.2d at 1164-65.

specifically noted that the study did not take into account the fact that Telpak and Hi-Lo were perfectly lawful practices.<sup>177</sup> Since the predatory pricing charges were central to MCI's case, its new damage evidence will have to project MCI's anticipated revenues in light of an AT&T pricing plan which MCI itself regarded as an insurmountable obstacle to its success.<sup>178</sup> The lawfulness of Telpak and Hi-Lo casts grave doubt on MCI's ability to earn the eighty-five cents per circuit mile it had originally projected in its lost-profits study.<sup>179</sup> Thus, if MCI presents a revised lost-profits study on remand, it seems likely that its projected revenue, and hence its lost profits, will have to be reduced significantly to be acceptable under the guidelines suggested by the Seventh Circuit.

McGowan's brash prediction fails for one additional reason. The bulk of MCI's profitability has come from the provision of Execunet, a residential long-distance telephone service which did not come into existence until 1977.<sup>180</sup> The success MCI has enjoyed through Execunet is irrelevant to the calculation of damages in a case which concerns only private line business telecommunications prior to 1975.<sup>181</sup> The Seventh Circuit specifically noted that it was improper for MCI to include revenues from Execunet service in the revenue assumptions in its lost-profits study.<sup>182</sup> The court concluded that the jury thus had no rational basis for finding that, without Execunet, MCI could have earned the revenues it had assumed it could have earned in the absence of AT&T's unlawful acts.<sup>183</sup> In sum, while the initial verdict in MCI's favor was of astonishing magnitude, the size of the ultimate award on remand should attract little attention.

## V. CONCLUSION

This article has examined the principal legal arguments raised in both the majority and the dissenting opinions in a case which has elicited considerable controversy over both its decision and the reasons given in support of that decision. If the Seventh Circuit is unable to speak with an entirely unified voice on the use and potential abuse of monopoly power, and how to assess a monetary penalty for such conduct, the court can take comfort in the fact that these issues continue to divide virtually all courts and commentators considering these questions. These irreconcilable divisions stem from

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177. *Id.* at 1161-64.

178. See Brief for Appellant at 171-72, *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

179. See 708 F.2d at 1164-66. This was the revenue figure MCI assumed it earned *per month* for each circuit mile. Total monthly revenues were derived by multiplying this \$.85 figure by the size of MCI's system, which was assumed to be 37 million circuit miles. *Id.*

180. Execunet was first authorized by the United States Circuit Court of Appeals for the District of Columbia in *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

181. 708 F.2d at 1195 app. (setting forth the jury instructions).

182. *Id.* at 1166-207.

183. *Id.*

fundamental differences regarding the proper regulation of monopoly power. The time has come for the Supreme Court to speak on the proper standards for judging predatory pricing, and other allegations under Section 2 of the Sherman Act, lest the jurisprudence of antitrust drift off in increasingly divergent and mutually exclusive directions.<sup>184</sup>

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184. Prior to the publication of this article, the United States Supreme Court declined to review the Seventh Circuit's opinion in *MCI*. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 52 U.S.L.W. 3280 (U.S. Oct. 11, 1983) (Nos. 83-21, 83-32, 83-217).

